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No. 90-848

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

BRIEF IN OPPOSITION

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18

RESTATED QUESTION PRESENTED

1. May an employee of a state-owned railroad sue his employer for money damages under the Federal Employees Liability Act (FELA) even though Congress has not clearly and unequivocally expressed an intent that FELA apply to the states?

TABLE OF CONTENTS

Page

RESTATED QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASON WHY CERTIORARI SHOULD NOT BE GRANTED 3

1. THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA CORRECTLY INTERPRETED THE DECISIONS OF THIS COURT THAT AN UNEQUIVOCAL EXPRESSION OF CONGRESSIONAL INTENT IS REQUIRED TO SUBJECT STATES TO FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE ... 3

A. The Clear Statement Rule Ensures That States Will Be Protected From Over-Reaching of the Federal Government 3

B. The Language "Every Common Carrier by Railroad" Is Not A Sufficiently Unequivocal Expression Of Congressional Intent to Subject States to the FELA 9

C. *Parden* Is No Longer Good Law and the Other Cases Cited by Petitioner do not Address the Issue Presently before the Court 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) 4, 7, 10

California v. Taylor, 353 U.S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957) 10

Edleman v. Jordan, 415 U.S. 651, 94 S. Ct. 1361, 39 L. Ed. 2d 664 (1974) 4, 9

Employees v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973) 4, 6

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) 2, 4, 5, 8, 11

Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 358 (1978) 6

Parden v. Terminal Ry. of Al. Docks Dept., 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) 9, 10, 11

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) ..5, 10

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981) 6

Pennsylvania v. Union Gas, 491 U.S. ___, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989) 7

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. ___, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990) 11

Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) 6

TABLE OF AUTHORITIES – Continued

Page

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) 7

U.S. v. Bass, 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) 7

United States v. California, 297 U.S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936) 10

United Transportation Union v. Long Island Railroad Co., 455 U.S. 678, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982) 10

Welch v. State Dept. of Highways and Public Transportation of the State of Texas, 780 F.2d 1268 (5th Cir. 1986) (Higgenbottom, P., concurring) *aff'd*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987) 4

Welch v. Texas Dept. of Public Highways and Public Trans., 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987) 1, 6, 9, 11

Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). 1, 5, 7, 9, 11

CONSTITUTIONAL PROVISIONS:

U.S. Const., amend X 5

U.S. Const., amend XI 5, 9

STATUTES:

42 U.S.C. § 1983 7

45 U.S.C. § 51 1

TABLE OF AUTHORITIES – Continued

Page

45 U.S.C.A. § 159(a) 10

S.C. Code Ann. § 58-19-10, (Law Co-Op. 1976) 1

MISCELLANEOUS:

L. Tribe, *American Constitutional Law*, § 3-37 at 140 (1978) 3

STATEMENT OF THE CASE

The State of South Carolina, through its South Carolina Public Railways Commission ("Commission"), operates a railroad. The Commission is an agency or instrumentality of the State of South Carolina. S.C. Code Ann. § 58-19-10, *et seq.* (Law Co-Op. 1976). Petitioner was injured in the course of his employment with the Commission. Invoking the Federal Employees Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), Petitioner brought an action against the Commission in the United States District Court. Following the decision in *Welch v. Texas Dept. of Public Highways and Public Trans.*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987), Petitioner voluntarily dismissed that action and refiled his claim in state court in South Carolina.

The Commission moved to dismiss on the grounds that a FELA claim could not be maintained against a state in state court, an issue left open by this Court in *Welch*, 483 U.S. at 476, 107 S. Ct. at 2955, 97 L. Ed. 2d at 398. The trial court dismissed the complaint and granted leave to Petitioner to amend to assert other available remedies. (Pet. Br., App. F). Petitioner appealed to the South Carolina Supreme Court. That Court affirmed, holding that FELA did not apply to state owned railroads. The Court based its decision on this Court's decisions in *Welch* and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

SUMMARY OF ARGUMENT

The decision of the South Carolina Supreme Court should be affirmed. An unequivocal expression of congressional intent to apply a federal statute to a state is required to preserve federalism. Requiring that congressional intent be clearly stated in a proposed statute puts all on notice as to if and how proposed legislation would affect the states. Only then can our political system properly assess and balance state and federal interests. States would otherwise be left without protection against the whims of the federal legislative process. *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Congressional authority to subject states to FELA is not at issue here. The issue is whether Congress has clearly stated an intent that FELA apply to the states. The search for that intent yields no unequivocal expression regarding the states. Nothing about the act suggests Congress ever thought about, much less deliberately considered, applying FELA to the states. The general language "common carrier by railroad" does not provide specific notice to the states, nor does it provide evidence of specific congressional intent to subject states to FELA liability.

REASON WHY CERTIORARI SHOULD NOT BE GRANTED

1. THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA CORRECTLY INTERPRETED THE DECISIONS OF THIS COURT THAT AN UNEQUIVOCAL EXPRESSION OF CONGRESSIONAL INTENT IS REQUIRED TO SUBJECT STATES TO FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE.

A. The Clear Statement Rule Ensures That States Will Be Protected From Over-Reaching of the Federal Government.

As Professor Tribe eloquently states:

> By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power would be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interest. Thus a recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes this an appropriate and useful approach to reconciling national power with state litigational immunity.

L. Tribe, *American Constitutional Law*, § 3-37 at 140 (1978).

Other courts have also expressed the need for unequivocal expression of congressional intent.

> *Garcia* concludes that the primary limit on this [federal] power is the political process of state participation in federal decision making. If this process is to have its force, legislation that is meant to affect states must say so; states will then be aware of proposed federal legislation perceived to intrude into their operations, and

> will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effects on states, and a court later declares that it applies to states, the process would have been skewed and the state would have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and the return of the judges from the sidelines.

Welch v. State Dept. of Highways and Public Transportation of the State of Texas, 780 F.2d 1268, 1275-76 (5th Cir. 1986) (Higgenbottom, P., concurring) *aff'd*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987).

A clear statement both protects the states and keeps the federal courts out of the business of making policy. The clear statement rule would prevent the national government from "devouring the essentials of state sovereignty." *Garcia*, 469 U.S. at 579, 105 S. Ct. at 1032, 83 L. Ed. 2d at 1052 (Powell, J. dissenting opinion). The concepts of federalism upon which *Garcia* certainly rests require that federal statutes be construed to exclude states unless Congress expressly indicates otherwise. "If a federal statute does not recite its applicability to states, the inquiry should end." *Welch*, 780 F.2d at 1275 (Higgenbottom, P., concurring).

As this Court's recent decision in *Welch* clearly points out, the Constitutional role of states sets them apart from other employers and defendants. *See also, Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246, 105 S. Ct. 3142, 87 L. Ed. 2d 171, 182 (1985); *Edleman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1361, 39 L. Ed. 2d 664, 679 (1974); *Employees v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279, 283, 93 S. Ct. 1614, 36 L. Ed. 2d 251, 257 (1973). A state's

constitutional interest in immunity encompasses both whether it may be sued and where it may be sued. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). This Court has already addressed the "where" question in requiring clear and unambiguous language to abrogate Eleventh Amendment immunity.[1] It is only logical that the Constitutional interest a state has in whether it may be sued at all would likewise require a clear and unequivocal statement.

Eleventh Amendment immunity is not the only immunity enjoyed by the states. Both the Tenth Amendment[2] and the very nature of our federal system of government establish constitutionally based immunities. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). One well established immunity is that a state cannot be sued without its consent. *Will*, 491 U.S. at ___, 109 S. Ct. at 2310, 105 L. Ed. 2d at 56.

This Court's Eleventh Amendment Jurisprudence also argues for applying the clear statement rule to decide the substantive "whether" question. This Court

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[1] The Eleventh Amendment provides: The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state. U.S. Const., amend. XI.

[2] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. U.S. Const., amend. X.

has noted on several occasions that a formal indication of Congress' intent to abrogate the states' Eleventh Amendment immunity insures that Congress has not imposed significant burdens on the states without careful thought. *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987). *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 358 (1978). *Employees of Dept. of Public Health and Welfare, Missouri v. Dept. of Public Health and Welfare, Missouri*, 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973).

The protections afforded by the aforementioned cases would be of little value if actions under federal statutes could be brought against states in state court, without an unequivocal expression of congressional intent. The clear statement rule must apply to both the jurisdictional and substantive issues raised when seeking to apply federal enactments to the states.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16, 101 S. Ct. 1531, 1539, 67 L. Ed. 2d 694, 707 (1981), this Court suggested that a clear statement rule should be used to determine the applicability to the states of federal legislation enacted pursuant to the Fourteenth Amendment. "If Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously." (Citations omitted). "By insisting that Congress speak with a clear voice we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*, 451 U.S. at 17, 101 S. Ct. at 1540, 67 L. Ed. 2d 707.

In *Will*, this Court noted that *Atascadero* was an Eleventh Amendment case, but that similar approaches should be applied in other contexts. "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the states." *Will*, 491 U.S. at ___, 109 S. Ct. 2308, 105 L. Ed. 2d at 54; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). Furthermore,

> In traditionally sensitive areas, such as the legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has, in fact, faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Will, 491 U.S. at ___, 109 S. Ct. at 2308, 105 L. Ed. 2d at 54. (Quoting) *U.S. v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971).

In *Will*, this Court affirmed that the scope of the Eleventh Amendment is a consideration in deciphering congressional intent as to the scope of 42 U.S.C. § 1983. *Id.*, 491 U.S. at ___, 109 S. Ct. 2309, 105 L. Ed. 2d at 55.

There is no logical reason to presume that the scope of the Eleventh Amendment is relevant when determining Congressional intent pursuant to its authority under the Fourteenth Amendment but not when Congress legislates pursuant to its authority under the Commerce Clause. *See, Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989).

This Court, in overruling *National League of Cities*, continues to "recognize that the States occupy a special position in our constitutional system and the scope of Congress' authority under the Commerce Clause must

reflect that position." *Garcia*, 469 U.S. at 556, 105 S. Ct. at 1020, 83 L. Ed. 2d at 1037.

> *National League of Cities*, reflected the general conviction that the Constitution precludes the national government from . . . devouring the essentials of state sovereignty.

Id., 469 U.S. at 547 (quoting), *Maryland v. Wirtz*, 392 U.S. at 205, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (dissenting opinion).

In short, "[i]t is no novelty to observe that the composition of the Federal Government was designed in large part to protect the states from over-reaching by Congress." *Garcia*, 469 U.S. at 551, 105 S. Ct. at 1017, 83 L. Ed. 2d at 1034.

The dissent in *Garcia* feared that the majority was subjecting the states to unlimited Congressional action, "reduc[ing] the Tenth Amendment to meaningless rhetoric." *Id.*, 469 U.S. at 560, 105 S. Ct. at 1022, 83 L. Ed. 2d at 1040 (Powell, J. dissenting opinion). The majority in *Garcia* found unworkable the traditional government function test as laid out in *National League of Cities* because of the difficulty of describing what is a traditional government function in the context of an ever-changing society. *Id.*, 469 U.S. at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1031. This Court, by requiring a clear statement from Congress in its enactments affecting the states would be creating a balance in which the historical and constitutional position of states and the federal government is preserved. Such a rule would be the most logical solution to the tension created by *Garcia*.

B. The Language "Every Common Carrier by Railroad" Is Not A Sufficiently Unequivocal Expression Of Congressional Intent to Subject States to the FELA.

The language "every common carrier" as employed in the FELA falls short of satisfying the ordinary rule of statutory construction that "if Congress intends to alter the usual constitutional balance between the states and the federal government," it must make its intention to do so "unmistakably clear in the language of the statute." *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S. Ct. 2308, 105 L. Ed. 2d 45, 54 (1989). In *Will* this court held that term "person" used in § 1983 does not include states. By overruling *Parden v. Terminal Ry. of Al. Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964)[3] this Court determined that the words "every common carrier by railroad" are not sufficiently clear or specific to include states for the purposes of the Eleventh Amendment.[4] The same result must be reached when analyzing whether Congress intended that FELA create a remedy against states at all.

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[3] The *Parden* Court failed to distinguish between a private employer and a state employer as required by a state's constitutional role in the federal system. Having done this, the Court then applied the general language "every common carrier" to the state. Furthermore, *Parden*'s constructive consent theory is no longer good law when associated with the surrender of Constitutional rights. *Edleman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[4] *Welch*, 483 U.S. 468, 107 S. Ct. 2941, 97 L. Ed. 2d 389.

C. *Parden* Is No Longer Good Law and the Other Cases Cited by Petitioner do not Address the Issue Presently before the Court.

Petitioner mistakenly relies on *United States v. California*, 297 U.S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936), *California v. Taylor*, 353 U.S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957), and *Parden* for the proposition that FELA applies to state-owned railroads. The *Taylor* Court suggested that because Congress did not expressly exempt railway workers employed by states from the Railway Labor Act, state railway workers were included in the Act. The *Taylor* Court's interpretation of the FELA is of dubious weight as precedent in this situation. *Taylor* stands for the proposition, no longer followed by this Court, that absent excluding language, general language includes state employees.[5]

Petitioner further relies on *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982) to support its position. In *UTU* the Court applied the Railway Labor Act[6] to the states based on the holding of *National League of Cities*. The Court held that the state-owned railroad in New York was not a traditional government function, and as such, was not immune from federal regulation. Subsequently

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[5] Constitutional role of the states sets state employers apart from other employers and defendant. *Atascadero*, 473 U.S. at 246. *Pennhurst II*, 465 U.S. at 99.

[6] *UTU* does not directly address the issue in question, in that Congress clearly intended the Railway Labor Act to apply to state-owned railroads. 45 U.S.C.A. § 159(a). The question in *UTU* was whether Congress had the power to apply the Act to a state-owned railroad.

this Court in *Garcia* overruled the traditional government function test:

> [T]he states must be equally free to engage in any activity that their citizens choose . . . no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be. Any rule of state immunity that looks to the "traditional", "integral" or necessary nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Id., 469 U.S. at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1030-31.

Finally, Petitioner asserts the recent case of *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. ___, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990) supports its proposition that the FELA applies to states. The issue in *Feeney* was whether the "state had waived its Eleventh Amendment immunity to suit in federal court."[7] The Court was not faced with and did not address the applicability of the FELA to a state-owned railroad.

Petitioner claims that the slate is not clean, [Pet. Br. p. 11] and therefore *stare decisis* dictates that FELA as applied to states by *Parden* must be followed. This Court's decisions in *Garcia*, *Welch* and *Will* have all but eliminated any precedential value *Parden* may have. The

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[7] *Feeney* involved an interstate compact that expressly permitted the bi-state corporation to sue and be sued in state and federal court. Four justices were of the opinion that the corporation was not the state and was not entitled to assert the Eleventh Amendment as a jurisdictional bar.

South Carolina Supreme Court correctly reasoned that for lack of a clear statement of applicability to the states in the FELA, Petitioner's remedy against the Commission must be found elsewhere.

CONCLUSION

The states enjoy certain immunities from impermissible encroachments upon their sovereignty by both the legislative and judicial branches of the federal government. Exercise of judicial branch authority affecting state treasuries in derogation of the states' Eleventh Amendment immunity is permissible against a nonconsenting state only upon a clear and unequivocal statement of Congressional intent. There is no reason in logic or policy to suppose that a lesser showing is sufficient to warrant intrusion upon the states by the legislative branch. In enacting the FELA Congress did not specifically or unequivocally express an intent to include states among the class of railroad employers potentially liable for money damages under the Act. Absent the required clear statement, the FELA must be held not applicable to state-owned railroads. The opinion of the South Carolina Supreme court should be affirmed.

Respectfully submitted,

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